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In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. 818

THE TIMKEN ROLLER BEARING COMPANY,
Petitioner,

vs.

THE NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION OF THE TIMKEN ROLLER BEARING COMPANY For Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

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PETITION OF THE TIMKEN ROLLER BEARING COMPANY For Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

The Timken Roller Bearing Company (herein called Petitioner or the Company) prays that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Sixth Circuit entered December 21, 1963, which affirmed an Order of the National Labor Relations Board against The Timken Roller Bearing Company.

OPINIONS BELOW.

The opinion of the Court of Appeals has not been reported but it is included in the appendix to this petition, *infra*, pp. 27-41. The Findings of Fact, Conclusions of Law and Order of the Board issued August 3, 1962 (Pet's App. 60a-64a) are reported at 138 N. L. R. B. 15.

JURISDICTION.

The decree of the Court of Appeals was entered on December 21, 1963. The jurisdiction of this Court is invoked under Section 10(e) of the National Labor Relations Act as amended and under 28 USC 1254 (1).

QUESTIONS PRESENTED.

1. The Company and Local 1123, United Steelworkers of America, AFL-CIO, entered into a Collective Bargaining Agreement dated February 22, 1960 (a copy is attached to Pet's App.) which contained among others Article IX covering the adjustment of grievances which provided for arbitration in respect of unresolved grievances. Article V of the Agreement covered the subject of wages. Section A of this Article froze existing wage rates for the term of the Agreement and provided that the Company would supply the Union with certain wage data; Section B specified the circumstances under which the Company could adjust existing wage rates or establish new wage rates; and Section C described the standard to be followed in the establishment of adjusted or new wage rates.

A number of grievances were pending under the preceding Agreement (1956 Agreement) (copy is attached to Pet's App.) when the 1960 Agreement was executed. In the summer of 1960, after one of the grievances which had been appealed to arbitration had been arbitrated (Grievance No. A-1414, Hose, arbitrated June 16, 1960), the Union demanded certain data dealing with the establishment of wage rates outside the grievance procedure. (Stipulation Ex. 14 A, pages 119a-122a and Stipulation Ex. 14 C, pages 127a-130a, Section 3 Pet's App.). The Court of Appeals affirmed an Order of the National Labor Relations Board, finding the Company in violation of Section 8(a) 5 of the National Labor Relations Act on the ground that under the Board's interpretation of the 1960 Agreement the word "complaint" in Article IX, Adjustment of Grievances, did not cover what were called "statutory" rights which the Board said the Union had under the Act without reference to the terms of the Agreement.

2. During the negotiations that preceded the execution of the 1960 Agreement, the Union presented a series of demands to the Company calling for the amendment of the wage data clause of Article V, Section A, in such a way as to expressly include in the contract provisions that would have required the Company to supply the same data demanded by the Union after the execution of the contract. (Stipulation Ex. 13 A, pages 164a-167a, Section 5 Pet's App.; Stipulation Ex. 13 B, pages 167a-175a, Section 5 Pet's App.; Stipulation Ex. 13 C, pages 175a-176a, Section 5 Pet's App.; Stipulation Ex. 13 D, pages 176a-177a, Section 5 Pet's App.) The Court of Appeals affirmed the Decision and Order of the Board overruling the Company's claim that there was a waiver by the Union of any right to demand the data except as it might be entitled to all or some part of it by proceeding under the grievance procedure of the 1960 Agreement.

STATUTES INVOLVED.

The pertinent provisions of the National Labor Relations Act (49 Stat., 449, 29 USC 151 et seq.) and of the Labor Management Relations Act 1947 (61 Stat., 136, 29 USC Supp. 2, 141 et seq.) are set forth in the appendix, *infra*, pp. 81-85.

STATEMENT.

Pursuant to a charge filed on November 26, 1960, by Local No. 1123, United Steelworkers of America, AFL-CIO, certified as bargaining agent for employees in the Company's Canton and Gambrinus plants, a Complaint was issued by the Board on January 5, 1961. (p. 2a, Pet's App.) The Board conducted a hearing on February 13, 1961, through its Trial Examiner who issued an Intermediate Report and a Recommended Order on April 18,

1961. (p. 17a, Pet's App.) A Supplemental Intermediate Report was issued on August 4, 1961. The Company filed exceptions to the Intermediate Report and Recommended Order and the Supplemental Order on August 25, 1961, and requested oral argument of the case. The request for oral argument was denied and the Decision and Order of the Board was issued on August 3, 1962.

In its Complaint in Paragraph 8, the Board stated that:

> "* * * the Union requested Respondent to furnish to the Union certain information, in particular the time study data and standard data pertaining to grievance No. A-1414, (Hose) which was before an arbitrator at that time, and which was dismissed by the arbitrator in a decision rendered on or about July 28, 1960." (Name inserted) (p. 4a, Pet's App.)

In Paragraph 9 of the Complaint, the Board asserted:

> "* * * at various times thereafter, the Union requested Respondent to furnish to the Union certain information, in particular, time study sheets; data, studies and other information used to determine rates; and documents, studies and other information used in job evaluations pertaining to grievances Nos. A-1547 (Rosenleib), A-1548 (Smallwood), A-1549 (Schuler), A-3352 (Wolak), and A-3412 (Van Kirk) * * *" (Names inserted) (p. 4a, Pet's App.)

In Paragraph 11 of its Complaint, the Board made the same charge in respect of the pending Grievance No. A-3451 (Ott).

In Paragraph 10 of the Complaint, the Board said that:

> "On or about July 18, 1960, and at various times thereafter, the Union requested Respondent to furnish to the Union certain information, in particular, time study manuals, instructions and procedures used

in the making of time studies, and manuals, instructions and procedures used in development of 'standard data,' said information being necessary for the Union's intelligent administration of the collective bargaining agreement referred to in Paragraph 5 above." (pp. 4a and 5a, Pet's App.)

Grievance Nos. A-1414, A-1547, A-1548 and A-1549 had been processed to arbitration under the 1956 Agreement. The remaining grievances mentioned in the Board's Complaint, Nos. A-3352, A-3412 and A-3451 were processed to arbitration under the 1960 Agreement.

The 1960 Collective Bargaining Agreement between the Company and the Union, to which reference was made heretofore, contained provisions for the adjustment of all complaints and grievances. Article IX, Section E, recited:

"The parties agree that the provisions of this Article IX provide adequate means, if followed, for *the adjustment and disposition of any complaints or grievances.*" (Emphasis added) (p. 36, 1960 Agreement)

An identical provision appeared in the 1956 Agreement. (p. 35, 1956 Agreement)

Any grievance unresolved in the earlier steps of the grievance procedure which involved the interpretation or application of the Agreement could be appealed to arbitration.

Section A of Article V—WAGES—of the 1960 Agreement contained the following provision:

"The Company will supply the Union with an up-to-date copy of the wage structure made effective by this agreement. It is understood that such data are extensive and that they will be submitted to the Union from time to time as their preparation is completed by the Company. As new rates are established as provided in Section B hereof, copies thereof will be

supplied to the Union. The Union agrees that all data connected with the Company's wage structure as submitted to the Union shall be maintained in confidence and will not be revealed in whole or in part to any competitor of the Company directly or indirectly." (p. 7, 1960 Agreement)

A similar provision appeared in the 1956 Agreement (p. 7, 1956 Agreement).

All the grievances referred to in the Board's Complaint were pending under the grievance procedure and in fact Grievance No. A-1414 referred to in Paragraph 8 of the Board's Complaint (p. 4a, Pet's App.) had been resolved by an arbitrator prior to the time that the Complaint was filed by the Board. In addition, Grievance A-3412, referred to in Paragraph 9 of the Complaint (p. 4a, Pet's App.) and Grievance No. A-3451, referred to in Paragraph 11 of the Board's Complaint (p. 5a, Pet's App.) were in the process of being disposed of under the grievance procedure of the contract by arbitrators duly appointed pursuant thereto and long before the Board reached any conclusion in the case, both cases had been disposed of by the arbitrators who were appointed to hear them. In each case the matter of the data to which the Union was entitled in respect of the processing of the grievances was submitted to the arbitrators and a determination was made as to what the Union was entitled to and the Company complied with the arbitrators' orders.

In the Company's Answer to the Board's Complaint the Company took the position that the contract provided an adequate means for disposing of grievances arising thereunder including the grievances referred to in the Board's Complaint. The Company asserted that there could be no violation of Section 8 (a). (5) or 8 (d) when the Company expressed its willingness at all times to have

the issues resolved and these matters disposed of in accordance with the grievance procedure.

In respect of the demand contained in Paragraph 10 of the Complaint (pp. 4a and 5a, Pet's App.) the Company contended that all this information could be obtained by following the grievance procedure prescribed in the contract; that the Union's demand was predicated upon a charge that the Company was in the process of changing rates, a claim that the Company denied and for which no proof was offered at the time of the hearing before the Board. The Company further contended that such general information was not needed at the time the demand was made by the Union generally for the reason that Section A of Article V of the 1960 Agreement froze all existing wage rates and they could not be changed during the term of the contract.

In further answer to the Board's Complaint the Petitioner asserted that during the course of the negotiations that preceded the execution of the 1960 Agreement, the Union had presented various demands to the Company for amendment of the wage data clause contained in the previous agreements and for the inclusion of provisions in the 1960 Agreement that would have expressly required the Company to supply the kind of information that was demanded during the summer of 1960 after the contract was executed. The Company asserted, and the proof on this point was undisputed, that the subject of the Union's demands had been discussed on numerous occasions during the course of the negotiations (Stipulation Exhibits 13 A, 13 B, 13 C and 13 D and Stipulation Exhibits 12 C, 12 E, 12 G, 12 I, 12 J, 12 K, 12 N, and 12 O, Pet's App.) but that such provisions were not included in the 1960 Collective Bargaining Agreement and the wage data clause in it remained unchanged.

THE BOARD'S CONCLUSIONS.

On the basis of the foregoing facts the Board dealt with the Company's claim that all the matters involved should be resolved in accordance with the grievance procedure in the contract by saying:

> "The grievance procedure in the bargaining agreement states that it provides an adequate means 'for the adjustment and disposition of any complaints or grievances.' A request for wage data, the Respondent contends, is a 'complaint' within the meaning of the foregoing language and, thus, must be processed through the grievance procedure. The Trial Examiner, in considering this argument, concluded, however, that Respondent was reading the term 'complaint' too broadly and held that under the language of the grievance provisions the term did not include disputes concerned with the exercise of statutory rights, such as are involved here." (p. 61a, Pet's App.)

Continuing, the Board found that the decision of the Trial Examiner was correct and commented that it was obvious from the contract that the parties did not intend to commit all the possible disputes in the whole scope of their relationship to the grievance-arbitration procedures for the following reasons:

> "First, as stressed by the Trial Examiner, though in the preamble the grievance-arbitration provisions cover all 'complaints,' the arbitrator's jurisdiction is limited in fact to disputes involving 'the interpretation and application of the agreement,' matters not concerned where, as here, the Union is asserting its statutory, no contractual, rights." (p. 62a, Pet's App.)

The Board then said:

> "Second, the contract on its face provides only for the filing of a grievance by 'employees' who have some

complaint concerning their working conditions. There is nothing to suggest the Union could file a grievance in order to assert its own rights to acquire general or specific wage data which it needs in order to carry out effectively its statutory responsibilities as the employees' representative." (p. 62a, Pet's App.)

In dealing with the issue of waiver the Board said:

"Furthermore, we agree with the Trial Examiner that the Union did not surrender its right to secure any of the wage data simply because it was unsuccessful in obtaining a provision in the contract requiring the production of such data by the Respondent. We can infer no 'clear and unequivocal' waiver of a statutory right from such failure at the bargaining table." (p. 63a, Pet's App.)

THE DECISION IN THE COURT BELOW.

The Court concurred generally in the Board's conclusions and, in disposing of the question of whether or not the Union's demands for data in respect of the grievances which had been appealed to arbitration and which were awaiting arbitration by arbitrators and in other instances had actually been arbitrated, said:

"The Company's contention that the request of the Union for wage information and the refusal of the Company to supply it in the absence of an order to do so constitutes a complaint or a grievance which is subject to arbitration under the terms of the collective bargaining agreement is, in our opinion, unsound for the following reasons.

"First, Article IX provides that only grievances involving the interpretation or application of the agreement (or disciplinary action, which is not applicable here) is eligible for appeal to arbitration. As hereinabove pointed out, the right of the Union to

wage information was not acquired through the bargaining agreement. Whether the demand of the Union should be honored, accordingly, does not involve the interpretation or application of the agreement, which is necessary in order to be eligible for arbitration, but, on the contrary, involves the interpretation and application of the National Labor Relations Act." (Appendix, *infra*, pp. 37-38.)

Secondly, the Court said that the grievance procedure provided by Section IX was limited to 'an employee who has not been able to adjust his grievance with his immediate supervisor' and the Court said:

"We do not construe the claim of the Union in the present case as being such an employee grievance."

Surprisingly the Court said that:

"It [the Union's demand] was not limited to the settlement of pending grievances."

The Court said that it agreed with the Board's conclusion that the Union's right to information was a right which it had under Section 8(d) of the National Labor Relations Act and said:

"It was not a right obtained by contract such as would be the case in increased wages, longer vacations, pensions rights and certain so-called fringe benefits."

The Court made the somewhat singular observation that:

"The failure to have the right recognized by the Company in the bargaining agreement which would probably eliminate the necessity of possible litigation over it later does not mean that it does not exist by virtue of the statute." (Appendix, *infra*, p. 34.)

In commenting upon the Petitioner's contention that Section 8(d) of the National Labor Relations Act does not

expressly provide for such a right, the Court cited two authorities for the alleged existence of the statutory right which we shall comment upon at a later point in this petition.

On the subject of waiver, the Court came to the conclusion that mere silence in the bargaining agreement on the issue of whether the Union had relinquished the right by its fruitless negotiations preceding the execution of the 1960 Agreement did not constitute a waiver. The Court said that:

> "Silence in the bargaining agreement on such an issue does not meet this test."

SPECIFICATION OF ERRORS TO BE URGED.

1. The Court below erred in holding that the Board could interpret the provisions of a collective bargaining agreement in respect of complaints and grievances in order to resolve a dispute which had arisen as to the data to which the Union is entitled and the manner in which such data is to be obtained and find the employer had refused to bargain collectively with the Union in respect of supplying wage data to the Union when the employer had expressed its complete willingness to have such questions resolved under the grievance procedure of the applicable collective bargaining agreement.

2. The Court below erred in holding that the Union had not waived any right to make separate demands for wage data when identical demands had been made during contract negotiations and no provisions therefor had been included in the applicable collective bargaining agreement.

REASONS FOR GRANTING THE WRIT.

1. The instant case is the first to be presented to this Court in which the propriety of the Board's construction of Section 8(a) (5) or 8(d) is involved where the matters complained of in the Board's Complaint are subject to grievance procedure under an existing Collective Bargaining Agreement with the terminal point of arbitration. We submit that this is an important question of Federal law which has not been, but should be, settled by this Court.

Unquestionably in this case there was a Collective Bargaining Agreement between the Company and the Union which provided for arbitration of the grievances described in Paragraphs 8, 9 and 11 of the Board's Complaint. Grievances had been filed by the Union on behalf of employees, both before the execution of the 1960 Agreement and after it was executed. Three of these grievances were actually arbitrated before the Board's Order and Decision was entered or before the complaint was filed. These grievances raised questions under Sections B and C of Article V of the 1959 and 1960 Agreements. In its Answer (pp. 7a-15a, Pet's App.) the Company asserted that all matters involved in the case could be resolved under the grievance procedure of the 1960 Agreement. In the evidence that was offered before the Board, the only witness who testified on behalf of the Company stated without contradiction or dispute that the Company was prepared to follow the order or an arbitrater in any of the cases in respect of any data which the Union claimed it wanted in connection with the prosecution of the grievances.

It is generally understood that the administration of a Collective Bargaining Agreement represents a continuation of the bargaining process. The 1960 Agreement channels the negotiations under the contract in accordance

with the terms of that Agreement. Section 203(d) of the Act provides that the final adjustment by a method agreed upon by the parties is the desirable method for the settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement. We submit that the Board is bound by this requirement and that is does violence to the purpose of the Act to permit the Board to undertake to interpret the Agreement by giving its interpretation of what is a "complaint." The power to interpret the contract is a matter which the parties reserved for determination by arbitrators selected in the manner prescribed in the Agreement.

The Board's conclusion is based upon what we believe is a clearly unsound ground, namely, that the Union is merely asking to enforce *its statutory rights* which are not covered by the Agreement. No authority for this position was cited by the Board in its decision.

It has always been the Company's position that the matter of wage data becomes of importance in the administration of the contract and in its interpretation under one set of circumstances, namely, a case in which the Company has established new rates as provided in Section C of Article V after one of the events spelled out in Section B of Article V has occurred. It simply is impossible to proceed under Section C to establish compliance by the Company with the practice in effect on the effective date of the Agreement as to the establishment of new wage rates unless all the data which the Union is now talking about wanting outside the grievance procedure is made available in the grievance procedure prior to arbitration and in the arbitration proceedings.

There certainly is no logic in the position that when the parties have agreed upon a method of resolving disputes under the contract relating to a specific subject mat-

ter covered in the Agreement and the Company had indicated its complete willingness to follow the procedure outlined in the Agreement, that the Board should intervene and charge a refusal to bargain under the Act. If this procedure is to be permitted, it is perfectly obvious that the foundation of the program outlined in the statute for the achievement of industrial peace is seriously eroded.

The Court below sought to find support for the alleged statutory rights of the Union supposed to exist outside the contract in two authorities, neither of which sustains this position. The authorities cited were *N. L. R. B. v. Yawman and Erbe Manufacturing Co.*, 187 F. 2d 947 and *California Portland Cement Co.*, 101 N. L. R. B. 1436. We respectfully submit that neither of these cases sustains the position for which they are cited by the Court in its Opinion. The Opinion by the Court of Appeals of the Second Circuit in the *Yawman and Erbe Manufacturing Co.* case involved a demand for data *made during contract negotiation*. The *California Portland Cement Co.* case is equally inapplicable for it does not appear from the Board's decision that the matters in dispute were susceptible of resolution by resort to arbitration proceedings provided for in the contract. Nobody would argue that a union could not demand relevant information as a part of the bargaining process looking toward the execution of a contract. But once a contract has been executed and complaints arise under it and a means for resolving them is provided for in the Agreement, there is no basis in the Act for the Board undertaking either to interpret the contract or find fictitious statutory rights as a means of avoiding the use of the contractual procedure by the parties in the disposition of grievances.

All the Board's claims in Paragraphs 8, 9 and 11 of the Complaint are based upon specific pending grievances.

three of which had been resolved by adherence to the grievance procedure long before the Board reached its decision.

Comment should be made as to the additional claim in Paragraph 10 of the Board's Complaint which as phrased in the Complaint does not apply exclusively to any pending grievance. The genesis of the Board's Paragraph 10 allegation were the letters written by the Union to the Company on July 18, 1960, and August 29, 1960 (Stipulation Exhibits 14a and c, pp. 119a and 127a, Pet's App.). Examination of the demands for these data in these letters sent to the Company by the Union will show that the demands were directed in large part to pending grievances (p. 130a, Pet's App.). Moreover, the claim of need of the data was grounded upon an alleged policy of the Company in changing rates which would have been, were it the truth, an obvious violation of Section A of Article V of the collective bargaining agreement (p. 129a, Pet's App.). No proof of any kind was offered in support of this position in the evidence presented to the Trial Examiner at the hearing of the case, but whether there was such a violation as to give rise to a need was not a matter over which the Board or the Court below had jurisdiction. Under the principles enunciated by this Court, which we shall discuss later in this petition, that was a matter for an arbitrator.

The items that are covered by the Union's demands were time study manuals and instructions and procedures used in the development of what was referred to as "standard data." Obviously if any of these items were needed in respect of the prosecution of any pending grievance, all or any relevant part of the demanded data could have been obtained under the grievance arbitration provisions of the contract. Once having been obtained in this fashion,

it would have been in the possession of the Union and from that time, of course, could have been used in any fashion that the Union wanted to use it.

On pages 5-6, *supra*, there is a quotation of the wage data clause that appeared in Article V, Section A of both the 1956 and 1960 Agreements which in essence required the Company to supply data as to the wage structure of the Company to the Union and to keep such data up to date. At no time has the Union ever undertaken to file a grievance under this language contending that the data sought was part of the wage structure. While the parties might disagree as to the scope and effect of this clause, the disagreement is one to be resolved by an arbitrator, and, as was stated during the hearing of the case, the Company would have accepted and followed the decision of an arbitrator that was grounded upon his authority under the collective bargaining agreement.

In the final analysis, any of the data that were demanded in connection with any pending grievance that was being prosecuted, or otherwise, would have been and should have been sought by following a contract procedure. The only proper way to deal with the matter would have been to request the data under the collective bargaining agreement and not make demands outside the confines of the collective bargaining agreement. Bypassing the contract procedure by intervention of the Labor Board is certainly not in conformity with the purposes of the Act. There is no question but that in any grievance involving any of this material, it could and would have been made available if ordered by an arbitrator.

We submit, therefore, that this is a question under Federal law as to which this Court has not spoken and it is one of widespread importance to employers and unions alike; that a decision in this case on the right of the

Board to invade the area covered by a Collective Bargaining Agreement between the parties as a basis for declaring an employer guilty of an unfair labor practice, to-wit: a refusal to bargain, is one that should be dealt with by this Court.

2. Indeed, this case represents a departure in principle from the three decisions announced by this Court in the summer of 1960—the so-called "trilogy." *United Steelworkers v. American Mfg. Co.*, 363 U. S. 564, *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U. S. 593, and *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U. S. 574. In these cases the Court expressed the view that where a means for resolving grievances was provided for in a labor contract between an employer and the union representing employees, which terminated in arbitration, this procedure should be adhered to and that it was not appropriate for a court to intervene and undertake to determine whether a grievance was a meritorious grievance; whether it was a matter that was arbitrable under the contract; or any other matter that was covered by the contract and subject to the grievance procedure. We submit that in this case when the Board undertook with the affirmance of the Court of Appeals to interpret the word "complaint" in the contract, it was proceeding in a fashion that was contrary to the principle announced in these cases by this Court. We urge that the Board is in no different position than a court and that it is not a proper function of the Board to intervene in respect of pending grievances or as to matters that could have been made the subject of a grievance and take out of the hands of arbitrators to be appointed under the Collective Bargaining Agreement the resolution of complaints and grievances that developed under the Agreement. The Board and the Court of Appeals refused to apply the prin-

ciple of these cases to the facts here involved. In fact, the Court below went so far as to say:

> "It is for the Court, not the arbitrator, to decide whether a claim is an arbitrable one under the bargaining agreement. * * * We are of the opinion that the claim of the Union for wage information and data was not an arbitrable one * * *." (Appendix, *infra*, p. 41.)

This is directly in conflict with the principle announced by this Court in the trilogy. We submit that this is a matter which this Court should deal with authoritatively.

3. Moreover, the decision of the Court of Appeals in affirming the Decision and Order of the Board is in conflict with the decision of another Court of Appeals. We refer to the decision of the Court of Appeals of the Fifth Circuit in *Sinclair Refining Co. v. N. L. R. B.*, 306 F. 2d 569. In that case a grievance was filed charging that the demotion of two employees was improper. Sinclair took the position that its action was exclusively a management function, but did, *as did the Company in the case before this Court*, acknowledge its willingness to arbitrate this dispute. When the grievance was in the first two steps of the grievance procedure, the Union made a demand on the Company for extensive data relating to the position of people in the seniority unit to which the two demoted employees were attached. When the Company refused to supply the data, the Board, at the Union's behest, issued a complaint and found the Company guilty of violating Section 8(b)(5) of the law. The Fifth Circuit reviewed this finding and, in essence, it determined that the decisions of this Court in the trilogy of cases decided in 1960 were dispositive of the Board's position that it could find an employer guilty of a refusal to bar-

gain under the law, when the employer was willing to arbitrate in accordance with the contract a matter that arose thereunder. The Court commented that "What the Supreme Court says of the relative incapacity of judges applies with equal force to those comprising the National Labor Relations Board." At another point in this Opinion the Court said:

> "Neither may the Board adjudicate the grievance dispute under the guise of determining relevance and pertinency of data sought. Because the Order under review clashes with the policy of effectual achievement of contractual arbitration it may not be enforced."

We submit that there is a plain conflict between the decisions of the Fifth Circuit in the *Sinclair* case and the decision of the Sixth Circuit in the case at bar.

Moreover, the muddled state of the law in this area is made apparent by reference to two other Board decisions which we submit have reached an entirely contrary result from the one that the Board reached in the case at bar. We refer to the decision of the Board in a case involving *Hercules Motors Corp.*, 136 N. L. R. B. 1648, and a more recent decision of the Board in another case involving *Sinclair Refining Co.*, 145 N. L. R. B. No. 68, a copy of which is included in the Appendix, *infra*, commencing at page 42. In each of these cases the Board reached the conclusion that, where the procurement of data was a matter that could be settled under the grievance procedure of a Collective Bargaining Agreement, the Board should not intervene and find a refusal to bargain where the employer was willing to conform to the requirements of the contract. A reading of the facts in the *Sinclair* case shows a remarkable similarity to those involved in this case.

In its Opinion in the *Sinclair* case, the Board sought to distinguish its views in the case at bar from what it said in *Hercules* and *Timken* (1) by saying as to *Hercules* the issue was whether the dispute was arbitrable which the Board conceded was a matter of contract interpretation and (2) as to *Timken* that Timken did not meet its bargaining obligation when it "refused" to give data to the Union which the Union said it needed "in policing or administering a contract or adjusting a grievance." The attempted distinction is, we submit, purely fictional. The Board's Complaint in this case relied upon demands made outside the grievance procedure for wage data relating to seven pending grievances and a slightly more generalized demand for data in Paragraph 10 of the Complaint. As to all these claims, the Company expressed its complete willingness to have all these questions resolved under the grievance procedure. Indeed, the subject of the Union's demands was resolved in three cases both before and after the Complaint was filed but before the Board reached its Decision and Order. The parties to the Agreement agreed upon a procedure for obtaining what the Union needed. We submit that there is an irreconcilable conflict between the Board's decisions in *Sinclair* and *Hercules* and its decision in this case.

4. The final matter which we believe warrants the consideration of this case by this Court on its merits relates to the subject of waiver. For some time prior to the 1960 Agreement, there had been a clause in the collective bargaining agreements requiring the Company to furnish certain wage data to the Union. During the negotiations that preceded the execution of the 1960 Agreement, beyond dispute there was a full discussion of a number of Union demands (the lower court referred to this series of proposals as "a proposal," appendix, *infra*,

p. 33) that would have enlarged this clause and would have required the Company to submit all manner of wage data to the Union (Section 5, Pet's App.). All these proposals were rejected by the Company and in the final negotiations these proposals were dropped by the Union and a contract was made in which there was no change in the pre-existing wage data clause.

The conclusion expressed by the Court of Appeals and by the Board involved a combination of two ideas. First, that a waiver could only be established by "clear and unequivocal" evidence and second, the rights that it was asserted the Union was undertaking to utilize in respect of the charge filed before the Board were statutory rights as contrasted with rights arising under the Agreement. We have already commented upon the second of these positions. As to whether the evidence was clear and unequivocal, we submit that it would be difficult to find a case in which the evidence was more unmistakable of an abandonment of the Union's position than in this case. Comparison of these proposals with the demands contained in the letters that were sent to the Company in July and August, 1960. Stipulation Exhibits 14 A and 14 C and Appendix Section 3 of Pet's App. show that they are very similar. If the law of waiver is to have any further application in respect of negotiation of contracts, this surely is a case for an application of that rule.

In the usual concept of a waiver there is a change of position that results from the activities of one party to the detriment of another. Surely that principle has full application in the case presented to this Court in this Petition. If the Board's position, which was affirmed by the Court of Appeals, is to be accepted, we are confronted with a case which is clearly at odds with the requirements of Section 8 (d) of the Act wherein it is provided that no

party to an executed collective bargaining agreement is required to discuss or agree to any modification of its terms and conditions for a fixed period of this agreement if the contract has a fixed period in it. When the Union reasserted its demands after the execution of the 1960 Agreement, it was, in effect, asking for a modification of the contract. The purpose of the Act of having a state of finality about the rights of the parties to the Agreement can always be defeated if we proceed on the assumption that once a contract has been arrived at that the rights of the Union as a collective bargaining agent still exist in the manner that they might have existed prior to the time that the contract was made. It would appear, we submit, that both the Board and the Court of Appeals have been undertaking to apply the principles of the cases that deal with the subject of the Union's entitlement to wage data as a part of the negotiating process. That is not a question that is involved in this case. It has been the Company's position that once a contract has been made that the rights of the parties—both Company and Union—and their obligations are to be determined by reference to the Agreement and not by conjuring up some statutory right for which there is no basis in the Act. The view expressed in the statute is that the preferred manner of settling labor disputes is by the negotiation of collective bargaining agreements.

In plain fact it is impossible to reconcile the Board's approach to waiver in this case with its approach to the same subject in a number of other cases. We refer to *Shell Oil Co.*, 93 N. L. R. B. 161, *Avco Mfg. Corp.*, 111 N. L. R. B. 729, *International News Service Div. of the Hearst Corp.*, 113 N. L. R. B. 1067 and in *Berkline Corp.*, 123 N. L. R. B. 685. In these cases the Board recognized that there was a substantial difference between a Union's demand for

wage data as a part of the bargaining process prior to the execution of an agreement and a later demand after an agreement was executed.

The Court's decision that there was no waiver in this case clearly is in conflict with the decision of another Court of Appeals—that of the Eighth Circuit in *National Labor Relations Board v. Nash-Finch Company*, 211 F. 2d 622. In the *Nash-Finch* case, the employer had carried hospitalization and group life insurance for its employees and had paid Christmas bonuses in prior years. The employer and the union which represented its employees entered into a collective bargaining agreement which made no mention of these benefits. Thereafter, the employer discontinued them unilaterally—without bargaining with the union about the discontinuation. The employer was charged with a refusal to bargain. The employer contended that the execution of the contract which contained no provision for the benefits constituted a waiver or acquiescence by the union in the elimination of the benefits. The Board found:

> "* * * the facts establish no more than an agreement on the part of the Union that Respondent be free of any *contractual* obligation to maintain the benefits for the duration of the contract. Respondent thus assumes that a union's willingness to forego contractual obligations by the employer to maintain certain existing working conditions must also be viewed as a grant of permission by the union to the employer to alter those conditions without consulting it or bargaining collectively about them. We see no justification for such an assumption. * * * We therefore find * * * that the Union's signing of this contract did not constitute a waiver of its statutory right that Respondent bargain with it regarding any changes in these conditions of work." (103 N. L. R. B. 1695, 1696-97)

The Eighth Circuit refused to enforce the Board's order and said:

> "Where parties to a contract have deliberately and voluntarily put their engagement in writing in such terms as import a legal obligation without uncertainty as to the object or extent of such engagement, it is conclusively presumed that the entire engagement of the parties and the extent and manner of their undertaking have been reduced to writing. * * *
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> * * *
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> The respondent, we think, may not be convicted of an unfair labor practice for doing no more and no less for its union employees than its collective bargaining agreement with them called for. * * *
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> It seems to us that what the Board has done, under the guise of remedying unfair labor practices is to attempt to bestow upon the respondent's union employees the benefits whi h it believes the Union should have obtained but failed to obtain for them as a result of its collective bargaining with the respondent on their behalf."

Thus, the Eighth Circuit found a waiver of the so-called "statutory rights" even though the contract was silent. The finding of the Sixth Circuit in the case at bar is in direct conflict with this finding of the Eighth Circuit.

The fact is that all the waiver cases involve a waiver of "statutory rights" in the final analysis. The union, and the employees it represents, have no inherent or *per se* right to hospitalization benefits, group insurance benefits, or Christmas bonuses—or wage data! Their only right is the statutory right to bargain on wages, hours and working conditions. Whenever there is a waiver, it is a waiver

of that right. Thus, the distinction which the Board and the Sixth Circuit attempted to draw between waiver in statutory right cases and waiver in contractual right cases is nonexistent.

We submit that this subject is one on which this Court has not spoken and it is one that we believe should be clarified by an Opinion of the Court.

CONCLUSION.

The questions raised by the decision below are of substantial public importance.

May the Labor Board at the behest of a union intervene in respect of grievances that arose under a collective bargaining agreement when the grievances can be resolved under the grievance arbitration procedure of the agreement? Is it a refusal to bargain for an employer to insist that the union follow the grievance procedure including arbitration? Is the Board in any different position from a court in respect of the arbitration of pending grievances as to which this Court said that it would take the most forceful evidence of an intent to exclude a case from arbitration?

The decision conflicts with the principles announced by this Court in the trilogy of cases decided in 1960. The decision below is not in accord with the purpose of the Act but, on the contrary, affords an easy means for the thwarting of its purposes. As has been shown, the decision is in conflict with the decisions of other Courts of Appeals on essential points and is at variance with the Board's decisions on the same questions. The lower court's views on the subject of waiver for all practical purposes remove waiver from the field of labor contracts.

It is respectfully submitted that this petition for a writ of certiorari should be granted.

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